LIBRARY
SUPREME COURT, U. S.

FILED
SEP 10 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-455

WOODROW SEE,
Petitioner,

vs.

LOCAL UNION 417, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DEE EDWARDS
1004 Industrial Building
Detroit, Michigan 48226
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Opinions Below 1-2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statutes Involved 3-4

Statement 4-7

Reasons for Granting the Writ 7

Argument 8-17

Conclusion 17

Appendix—

Motion for Reconsideration A1

Order Denying Motion to Dismiss A2

Memorandum A3

Order Granting Defendants' Motion for Summary Judgment A5

Notice of Appeal A6

Order of Sixth Circuit Court of Appeals A6

Order Denying Motion for Summary Judgment A7

Memorandum Re Defendant's Motion for Summary Judgment A7

Second Memorandum Re Defendant's Motion for Summary Judgment A10

Order Granting Defendant Union's Motion for Summary Judgment A12

Order of Sixth Circuit Court of Appeals (Second Appeal) A13

Citations

Al Orphan et al. v *Furnco Construction Corp.*, 466 F.2d 795 (C.A. 7, 1972) 15

Anderson v *Ford Motor Co.*, 319 F.Supp. 134, 137 (D.C.E.D. Mich., 1970) 16

Boys Market, Inc. v *Retail Clerk's Union, Local 770*, 398 U.S. 325, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970) 12

Brady v *Trans World Airlines*, 401 F.2d 87, 104 (C.A. 3, 1968), *certiorari denied I.A.M.* v *Brady*, 393 U.S. 1043, 89 S.Ct. 680, 21 L.Ed.2d 69 ..... 11, 13

Bsharah v *Eltra Corp.*, 394 F.2d 502, 503 (C.A. 6, 1968) 16

Conley v *Gibson*, 355 U.S. 41 (1957) 11

Czosek, et al. v *O'Mara, et al.*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970) 10

Dairy Queen, Inc. v *Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) 16

Durandetti, et al. v *Chrysler Corp. and United Automobile Workers*, 195 F.Supp. 653, 656 (D.C.E.D. Mich., 1961) 16

Frederickson v *System Federation No. 114 of Railway Employees' Department, AFL-CIO*, 436 F.2d 764, 768 (C.A. 9, 1970) 14

Glover v *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 21 L.Ed.2d 519 (1969) 9, 10, 11

Imbrunnone v *Chrysler Corp.*, 336 F.Supp. 1223, 1225 (D.C.E.D. Mich., 1971) 16

John Wiley & Sons, Inc. v *Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) 12

Leimer v *Woods*, 196 F.2d 828 (C.A. 8, 1952) 16-17

National Life Insurance Co. v *Silverman*, 454 F.2d 899 (C.A. D.C., 1971) 17

N.L.R.B. v *Industrial Union of Marine Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed.2d 706 (1968) 12

Retana v *Apartment, Motel, Hotel and Elevator Operators Union, AFL-CIO*, 453 F.2d 1018, 1027-1028 (C.A. 9, 1972) 14

Smith Sales v *Petroleum Heat & Power Co.*, 141 F.2d 41 (C.A. 3, 1944) 17

Steelworkers v *Enterprise Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) 12

Steelworkers v *Warrior & Gulf Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) 12

Stringfield, et al. v *International Union of United Rubber, Cork, Linoleum & Plastic Workers*, 190 F.Supp. 380 (D.C.E.D. Mich., 1959), *affirmed* 285 F.2d 764 (C.A. 6, 1960) 15

Swofford v *B & W, Inc.*, 336 F.2d 406 (C.A. 5, 1964) 16

Syres v *Oil Workers International Union, Local No. 23 and Gulf Oil Corp.*, 223 F.2d 739, 740 (C.A. 5, 1955), *reversed* 350 U.S. 892 9

Vaca v *Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) 6

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

WOODROW SEE,
Petitioner,

vs.

LOCAL UNION 417, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Woodrow See, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 13, 1973.

OPINIONS BELOW

The judgment of the district court (46a) granting defendants' motion for summary judgment is unreported.

The opinion of the Court of Appeals (47a-48a) is also unreported.

The opinion of the Court of Appeals, on the first appeal (36a-37a), is also unreported, as is the earlier order of the District Court. (35a)

JURISDICTION

The judgment of the Court of Appeals is dated June 13, 1973, and was entered on the same date. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I. Is the exhaustion of internal union appeal procedures a condition precedent to an action for breach of the duty of fair representation?

II. Where an arbitrator's award unconditionally ordered plaintiff reinstated to employment, does an allegation that his union confederated and cooperated with the employer to deprive him of the benefit of the award by agreeing that he must first pass a physical examination state a cause of action against the union for breach of its duty of fair representation?

III. Did the District Court and the Court of Appeals unconstitutionally deprive plaintiff of his right to trial by jury by determining, with no proofs whatsoever before it, that plaintiff suffered no damages beyond the amount for which he settled with the employer?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VII—Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. (U.S.C.A., *Constitution*, p. 696)

STATUTES INVOLVED

Labor-Management Relations Act of 1947, as amended:

"Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

* * *

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . ."

* * *

"Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization represent-

ing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 61 *Stat.*, 140, 143, 156. 29 U.S.C., Secs. 157, 159(a), and 185(a) and (b)."

STATEMENT

This is a suit arising out of a violation of a contract between an employer and a labor organization and jurisdiction rests upon 29 U.S.C.A., Section 185, 61 Stat. 156, Title III, Section 301. Plaintiff was, and is, a citizen of the United States of America, and a resident of the City of Clawson, in Oakland County, Michigan, in the Southern Division of the Eastern District of Michigan. Defendants, Local Union 417, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW) and International Union, United Automobile, Aircraft and Agri-

cultural Implement Workers of America (UAW) are labor organizations representing the plaintiff, in an industry affecting commerce as defined in the Labor-Management Relations Act of 1947, as amended, being 29 U.S.C.A., Section 151 *et seq.* (3a-4a)

Plaintiff was employed by Hawthorne Metal Products, Royal Oak, Michigan, as a shear operator from October, 1958, until July, 1962, when he was discharged for insubordination. Plaintiff filed a grievance to protest his discharge which was carried to arbitration. On September 12, 1962, the arbitrator issued his award: "Woodrow See is ordered reinstated but without back pay." (5a, 19a) The collective bargaining agreement provided: "The decision of the umpire shall be final and binding on both parties." (5a)

Plaintiff reported for employment but the company demanded that he submit to a physical examination by its doctor. Plaintiff objected to this demand but was advised by the union to submit. (30a) The company doctor claimed See was physically unable to perform the job he had held for four years without difficulty. The company refused to reinstate him and plaintiff requested the union to enforce the award. (5a)

The shop committee first agreed to have plaintiff submit to another examination, but the executive board of the local union ordered the shop committee to negotiate See back to work. (22a, 31a) Later the local reconsidered and returned to its insistence that plaintiff submit to another physical examination. (22a) Plaintiff refused to do so for over a year, then yielded and was declared able to work by the Ford Hospital. (25a, 32a) The company then refused to reinstate See unless he waived all back pay from September 12, 1962, the date of the arbitrator's award to December 30, 1963, the date reinstatement was offered

on condition he sign such waiver. Plaintiff refused (6a, 26a)

In January, 1964, suit was commenced against both the company and the union. The company, in return for a covenant not to sue and an agreement whereby See waived his right to return to work at that company, paid See $15,000, and the cause was discontinued as to it on April 9, 1964. The remaining items of damages include plaintiff's loss of wages and fringe benefits for the period of September 12, 1962 to the date of settlement with the company; compensation for humiliation, embarrassment and worry; and his actual attorney's fees.

In 1964, 1965, and 1966, the District Court entertained a continuous series of motions and arguments by the defendant unions that the cause should be dismissed because (1) exclusive jurisdiction was in the National Labor Relations Board and (2) the plaintiff had failed to allege exhaustion of intra-union remedies as a condition precedent to suit. In January, 1967, this motion was granted, after having been previously twice denied. An appeal was duly taken to the Court of Appeals for the Sixth Circuit which reversed on the authority of *Vaca* v. *Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) on April 26, 1968. On the appeal both of the above issues were briefed and argued. The Court of Appeals dealt directly only with the question of the jurisdiction of the National Labor Relations Board in its opinion. (36a-37a)

From January, 1969, until October, 1972, the defendant unions continued to argue a motion for summary judgment on the grounds that (1) plaintiff had failed to exhaust his intra-union remedies before commencing suit; (2) plaintiff had failed to allege that the union had acted arbitrarily, discriminatorily, or in bad faith; and (3) that the cause

was moot because the $15,000 paid by the company was "more than adequate to compensate plaintiff for any loss sustained." (38a) The motion for summary judgment was first denied, brought again, and finally granted on December 19, 1972. (46a) An appeal was duly taken to the Court of Appeals for the Sixth Circuit which affirmed on June 13, 1973. (47a-48a)

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Sixth Circuit has decided a Federal question in conflict with the applicable decisions of this court.

2. The Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decision of other Courts of Appeals on the same matter.

3. The Court of Appeals for the Sixth Circuit has exceeded its authority under the Seventh Amendment to the United States Constitution and has deprived petitioner of his right to trial by jury.

ARGUMENT

1. The Court of Appeals for the Sixth Circuit has decided a Federal question in conflict with the applicable decisions of this court.

The decision of the Court of Appeals for the Sixth Circuit is in conflict with the applicable decisions of this court in two lines of cases: those dealing with the question of exhaustion of internal union remedies in breach of duty of fair representation suits and that line of cases which enunciates the strong public interest in maintaining the integrity of the grievance and arbitration processes.

We discuss first the defendants' contention, and the finding of the Court of Appeals, that the plaintiff has failed to plead any claim of fraud, deceitful action, dishonesty, arbitrary or discriminatory conduct or bad faith on the part of the union. It is the plaintiff's position that an allegation that the defendant not only failed and refused to enforce the arbitrator's award but, on the contrary, cooperated with the company to prevent the plaintiff from receiving the fruits of his award and engaged in a course of dilatory action calculated to delay the return of the plaintiff to his employment is a description of arbitrary action and bad faith in the clearest terms. We are inclined to agree with the Court of Appeals that there is no issue of fact to be tried concerning the plaintiff's claim of arbitrary action and bad faith, but only because the union's conduct is clearly in violation of the plaintiff's right under the collective bargaining agreement to have the arbitrator's award accepted as final and binding and enforced accordingly, that it must be held arbitrary as a matter of law. The only response the union could properly make from the time that the employer in-

formed plaintiff he would have to submit to a physical examination as a condition of return to employment was to advise the employer that the arbitrator's award could not be so modified by the employer and must be obeyed according to its terms; and if the employer then refused. to go into court to obtain a mandatory injunction.

One of the earliest cases we find in which this court considered a claim that exhaustion of internal union remedies was a condition precedent to a suit for breach of duty of fair representation is *Syres* v *Oil Workers International Union, Local No. 23 and Gulf Oil Corp.*, C.A. 5, 1955, 223 F.2d 739, 740, *reversed* 350 U.S. 892, in which the Court of Appeals for the Fifth Circuit had affirmed a dismissal of an action by certain employees of Gulf Oil Corporation and their union for a declaratory judgment that a collective bargaining agreement was void and for damages for the breach of duty of fair representation. This alleged discriminatory action was based upon the inclusion of racially motivated provisions in the contract. The issue of the necessity of exhaustion of internal union remedies was raised by the corporation. This court reversed the Court of Appeals for the Fifth Circuit and remanded the cause for trial.

Glover v *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 21 L.Ed.2d 519 (1969), was an action by employees charging racially motivated discrimination in the administration of a collective bargaining agreement. Both employer and the union were named as defendants. The motion to dismiss included as grounds that plaintiffs had not exhausted the administrative remedies provided for them by the grievance machinery in the collective bargaining agreement, in the constitution of the Brotherhood, and before the National Labor Relations Board. The District Court granted the motion to dismiss and the Court

of Appeals for the Fifth Circuit affirmed. In holding plaintiffs were not required to exhaust such administrative remedies, this court said:

> The allegations are that the bargaining representatives of the car employees have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race. If that is true, insistence that petitioners exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these petitioners according to their allegations are justly and legally entitled. *Glover* v *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 331, 21 L.Ed.2d 519.

In the instant case no reason has ever been given for the union acting as it has excepting that it was proceeding on "advice of counsel." (16a) It is a fair inference from the record (31a) that the International Union was more interested in maintaining friendly relationships with the company than in enforcing the rights of the employees whom they represented.

Czosek, et al. v *O'Mara, et al.*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970), was an action against an employer and union for damages arising from wrongful discharge under the terms of a collective bargaining agreement and failure to process grievances filed in protest. The District Court dismissed the action. The Court of Appeals for the Second Circuit reversed as to the union defendants, holding "that the complaint was adequate to allege a breach by the union of its duty of fair representation subject to vindication in the District Court without resort to administrative remedies." In affirming the decision of the Court of Appeals, this court stated ". . . Surely

it is beyond cavil that a suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts. *Glover* v *St. Louis-San Francisco Railway Co.*, 393 U.S. 324 (1969); *Conley* v *Gibson*, 355 U.S. 41, 45-46 (1957)." While it is possible this court was referring solely to the proceedings before the National Railroad Adjustment Board in referring to "administrative remedies" the same logic should apply in reverse. If the National Railroad Adjustment Board cannot give relief by way of damages to the plaintiff in *Czosek* against the union, by the same token no appeal within the union can result in plaintiff's reinstatement to employment; ultimately this would have to be done by a court proceeding to enforce the award. The only result would be a longer period of time during which the plaintiff was deprived of his right to return to employment. See *Brady* v *Trans World Airlines*, 401 F.2d 87, 104 (C.A. 3, 1968), *certiorari denied I.A.M.* v *Brady*, 393 U.S. 1048, 89 S.Ct. 680, 21 L.Ed.2d 69. *Czosek* also supports plaintiff's right to recover damages caused by the union's conduct.

The decision of the Court of Appeals for the Sixth Circuit is in conflict with the decisions of this court in cases involving attacks on the grievance and arbitration process. If the decision of the Court of Appeals in this case is allowed to stand there is no question that arbitration awards will cease to be final and binding and may be flouted with impunity—thereby threatening the entire system devised for the resolution of industrial disputes. It will not matter whether the alleged reason for refusing to abide by an award is a claim that the employee cannot pass a physical examination or something else; once the

wall is breached the fertile minds of employers will produce any number of reasons for not reinstating employees when ordered to do so by an arbitrator.

This court has, on a number of occasions, emphasized the importance of arbitration as a means of resolving disagreements and preserving industrial peace. To name only a few, *Steelworkers* v *Warrior & Gulf Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *Steelworkers* v *Enterprise Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *John Wiley & Sons, Inc.* v *Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); *Boys Market, Inc.* v *Retail Clerk's Union, Local 770*, 398 U.S. 325, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970). In its discussion in *Steelworkers* v *Enterprise Corp., supra*, this court points out that if the courts undertake to review the merits of an arbitrator's award, such awards will almost never be final. Page 599. The same comment applies with equal force to any undertaking by a court to determine whether an employer was justified in refusing to give effect to an award, absent a direct attack on the grounds of fraud, corruption, misconduct or excess of authority.

The public interest in the use of arbitration has not only been recognized by this court in the above cases, and many others, but has been recognized by Congress in conditioning the right to injunctive relief in labor disputes on the prior use of negotiation and arbitration. 29 U.S.C., Section 108.

In view of this, the decision of this court in another context, to the effect that where there is a public interest involved exhaustion of internal union remedies is not a condition precedent to legal proceedings is apropos. *N.L.R.B.* v *Industrial Union of Marine Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed.2d 706 (1968). After holding that exhaustion of

internal union remedies was not a condition precedent to the filing of an unfair labor practice charge against a union, and that a member could not be expelled for so doing because of the public interest in protecting the exercise of rights guaranteed by the Labor-Management Relations Act, this Court stated:

> "In the present case a whole complex of public policy issues was raised by Holder's original charge. It implicated not only the union but the employer. The employer might also have been made a party and comprehensive and coordinated remedies provided. Those issues cannot be fully explored in an internal union proceeding. There cannot be any justification to make the public policies wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union, and employee member." p. 424.

The strong public policy favoring arbitration, and the necessity that it be both speedy and final if it is to be effective, warrants the application of the above comments to this case.

2. The Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decision of other Courts of Appeals on the same matter.

Brady v *Trans World Airlines, et al.*, 401 F.2d 87 (C.A. 3, 1968), was an action against an airline and the plaintiff's union for alleged violation of a collective bargaining agreement and the breach of duty of fair representation. The Court of Appeals for the Third Circuit distinguished carefully between the claims involving the plaintiff's employment status and allegations of hostile discrimination on the part of the union which, in that case,

involved purely internal union affairs and held that the doctrine of the exhaustion of internal union remedies as a condition precedent to suit has no application where the employer-employee relationship is involved. Page 104. See also the District Court's opinion reported at 223 F.Supp. 361. The rationale of the court was that no proceedings within the union could by and of themselves result in the restoration of the plaintiff to employment, and would, therefore, be futile.

The decision of the Court of Appeals for the Sixth Circuit also conflicts with that of the Ninth Circuit in holding that the question of whether plaintiff has exhausted his remedies within the union, or whether it would be futile for him to do so, is a question of law rather than of fact. In *Frederickson* v *System Federation No. 114 of Railway Employees' Department, AFL-CIO*, 436 F.2d 764, 768 (C.A. 9, 1970), that court held a union must show there is an adequate internal remedy and that in the absence of any evidence on this point it is necessary to have a factual hearing on the question. In the instant cause the union has on numerous occasions outlined the appeal procedure provided by the constitution of the union. At no time, however, has it offered any evidence as to the effectiveness of the procedure. Bearing in mind that plaintiff was informed by his local union counsel (32a) that any appeal within the union would be useless because no one ever succeeded, a factual issue arises. No evidentiary hearing was held on this point.

In *Retana* v *Apartment, Motel, Hotel and Elevator Operators Union, AFL-CIO*, 453 F.2d 1018, 1027-1028 (C.A. 9, 1972), the plaintiff was a Spanish-speaking maid who felt she had been wrongfully discharged. After discussing the peculiar responsibility of the union as her collective bargaining agent, in view of the language barrier,

the court held that the fact she had repeatedly solicited the union's assistance in processing her grievance without result might excuse her failure to exhaust further remedies on the ground that she reasonably believed such efforts would be futile. Again, in the instant case we have the situation in which the plaintiff after two months of protests to the local was taken to the International Union, where he was advised by an International Union attorney to submit to the demand of the company and union that he undergo another physical examination.

All of the proceedings in this case demonstrate that there are factual questions whether under all the circumstances he had any duty to exhaust internal union remedies and whether it was futile for him to go farther than he did. These questions, like any other fact questions, would be for the jury, and would certainly bar summary judgment.

In *Al Orphan et al.* v *Furnco Construction Corp.*, 466 F.2d 795, 801-803 (C.A. 7, 1972), the Court of Appeals for the Seventh Circuit held that where the employee has made some effort to pursue intra-union remedies, whether the effort is sufficient is a question to be determined only after a hearing on the facts; and the same applies to the issue of the effectiveness of any remedy within the union.

The question as to whether resort to internal union remedies is a condition precedent to an action for breach of the duty of fair representation, and, if so, whether the effectiveness of the intra-union remedy or the sufficiency of the attempt to pursue it is a question of fact or law, is of substantial importance to the residents of this Circuit. Among the cases which have been dismissed for alleged failure to pursue or exhaust intra-union remedies are: *Stringfield et al.* v *International Union of United Rubber, Cork, Linoleum & Plastic Workers*, 190 F.Supp. 380 (D.C. E.D. Mich., 1959), *affirmed* 285 F.2d 764 (C.A. 6, 1960).

Durandetti et al. v *Chrysler Corp. and United Automobile Workers,* 195 F.Supp. 653, 656 (D.C.E.D. Mich., 1961). *Bsharah* v *Eltra Corp.,* 394 F.2d 502, 503 (C.A. 6, 1968). *Anderson* v *Ford Motor Co.,* 319 F.Supp. 134, 137 (D.C.E.D. Mich., 1970). *Imbrunnone* v *Chrysler Corp.,* 336 F.Supp. 1223, 1225 (D.C.E.D. Mich., 1971). All of the above involved alleged breaches of the duty of fair representation and there is no indication that either the question of the effectiveness of the claimed intra-union remedy or the futility of further pursuit of such remedies was ever made the subject matter of an evidentiary hearing to determine the facts.

3. The Court of Appeals for the Sixth Circuit has exceeded its authority under the Seventh Amendment to the United States Constitution and has deprived petitioner of his right to trial by jury.

The proposition that the District Court and the Court of Appeals have deprived the plaintiff of his right to a trial by jury as to the amount of damages is too patent to need much citation of authority.

A jury was timely demanded by plaintiff. The decisions of the District Court and the Court of Appeals to the effect that plaintiff has been fully indemnified for his damages by his settlement with the employer constitute a determination of the amount of his damages which clearly is a matter solely within the province of the jury. It is, therefore, an unconstitutional denial of due process of law. Cases holding that damages are for the jury include, among others: *Dairy Queen, Inc.* v *Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Swofford* v *B & W, Inc.,* 336 F.2d 406 (C.A. 5, 1964), *certiorari denied* 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557; *Leimer* v *Woods,* 196 F.2d 828

(C.A. 8, 1952); *Smith Sales* v *Petroleum Heat & Power Co.*, 141 F.2d 41 (C.A. 3, 1944); *National Life Insurance Co.* v *Silverman*, 454 F.2d 899 (C.A. D.C., 1971).

Insofar as this is held to be a ground for dismissal it is clearly contrary to accepted legal principles.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DEE EDWARDS
Attorney for Petitioner

Dated: Sept 7, 1973

APPENDIX

ORDER DENYING MOTION TO DISMISS

(Filed July 8, 1964)

Upon consideration of the MOTION TO DISMISS filed herein by the defendant unions, and

After oral argument in open court by counsel for the respective parties and consideration of the allegations contained in the amended complaint as they pertain to the defendant unions, and

It appearing to the Court in the present posture of this case that there exist factual issues, the development of which is necessary to an evaluation of plaintiff's cause of action, thus precluding the possibility of dismissal of the action at this time,

IT IS ORDERED AND ADJUDGED that the instant motion to dismiss be and the same is hereby denied.

Thomas P. Thornton
United States District Judge

MOTION FOR RECONSIDERATION

(Filed August 31, 1964)

Defendants International Union, UAW and its Local Union 417 move the Court, for the following reason, to reconsider its order denying said defendants' Motion to Dismiss.

The Court's order of denial was based upon the conclusion that there are material issues of fact in the case.

The transcript of the hearing on defendants' Motion to Dismiss reveals, however, that there are no material issues of fact. This transcript was not available to the Court at the time it entered its order of denial.

Since there are no material issues of fact in the case and since the complaint does not state a cause of action, defendants' Motion to Dismiss should be reconsidered and granted.

Joseph L. Rauh, Jr.
Stephen I. Schlossberg
John A. Fillion
Bernard F. Ashe
Jordan Rossea
By /s/ John A. Fillion

ORDER DENYING MOTION TO DISMISS

(Filed March 26, 1965)

On July 8, 1964, the Court entered an order denying the motion to dismiss which had been filed herein by defendant unions. Subsequently, said defendant unions moved for reconsideration of said order. The Court granted the motion for reconsideration after oral argument in open court. The parties have filed briefs and memoranda in support of their respective positions concerning the motion to dismiss.

The Court has again reviewed the pleadings on file herein and the recent briefs submitted by counsel for the respective parties. It is even clearer now that there are factual issues which must be developed before any determinative ruling can be made by the Court pertaining to the grounds urged by defendant unions in support of their motion to dismiss. In the last memorandum of de-

fendant unions, submitted March 4, 1965, it is stated that even if the Union made a wrong choice in failing to insist that plaintiff be returned to work without further examination "the mistake plainly was one of judgment and not one motivated by hostility to plaintiff or a lack of concern for his wellbeing." In support of the above, defendant unions cite several cases, including *Stringfield* v. *International Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 190 F. Supp. 380, in which the Court said:

> "In addition, the amended complaint is 'barren of any allegations from which the existence of any hostile discrimination may reasonably be inferred.' " (page 381)

We cannot say that the same situation exists here. The allegations herein are such that we are unable to infer the existence of friendly motivation anymore than hostile. This is only one of the aspects of this case that makes the presentation of evidence a necessity.

We adhere to our earlier conclusion that the instant motion to dismiss should be denied.

It is so ordered.

Thomas P. Thornton
United States District Judge

MEMORANDUM

(Filed January 13, 1967)

This is the case of an employee whose discharge from his job was challenged by him through the applicable grievance procedure, terminating in arbitration. The award of the arbitrator stated that "Woodrow See is or-

dered reinstated but without back pay". The company refused to honor the order of the arbitrator and denied reinstatement to See (the company requiring physical examination as a condition precedent). Subsequently, plaintiff brought this suit against his employer and the defendant unions. The employer is no longer a defendant herein because of a settlement agreement reached between it and plaintiff. The suit continues against defendant unions.

Plaintiff sues for "violation of a contract between an employer and a labor organization" within the meaning of 29 U.S.C.A. §185, claiming that such violation resulted from a breach of the duty of fair representation by the defendant unions.

The Court presently has before it defendant unions' motion for summary judgment which has been argued in open court by counsel for the respective parties. The thrust of defendants' motion is that the subject matter herein is "within the exclusive primary jurisdiction of the National Labor Relations Board."

The Court of Appeals for the Sixth Circuit has recently held in a matter appealed from the ruling of another judge of this court that:

> "The district court dismissed the action on the ground that the court lacks jurisdiction, holding that (1) the expulsion of plaintiff from the union took place before September 14, 1959, the effective date of the Labor-Management Reporting and Disclosure Act, and that the Act is not retroactive; and (2) the claim of plaintiff that the union has not represented him fairly and thereby has caused him to suffer pecuniary damages presents a matter within the exclusive jurisdiction of the National Labor Relations Board. We agree with the opinion of Chief Judge Levin, which is re-

ported in 223 F.Supp. 1009, and accordingly affirm the judgment of the district court." *Knox* v. *UAW*, 351 F. 2d 72, 73 (C.A. 6, 1965)

In view of such a clear-cut holding, the Court grants defendants' motion for summary judgment.

An order in accordance with the foregoing may be presented, no costs to be allowed.

Thomas P. Thornton
United States District Judge

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed February 10, 1967)

A motion having been regularly made by defendants for summary judgment in their favor dismissing the action on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law,

Now, on considering the pleadings, affidavits, and briefs filed by the parties, and after hearing counsel for both sides, and due deliberation having been had, and a memorandum setting forth the Court's opinion and decision having been filed, it is

ORDERED, that said motion be and the same hereby is granted, and that judgment be entered herein in defendants' favor dismissing this action with prejudice and without costs.

Thomas P. Thornton
United States District Judge

NOTICE OF APPEAL

(Filed March 6, 1967)

Notice is hereby given that Woodrow See, plaintiff, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the summary judgment entered in this action on February 14, 1967.

/s/ Dee Edwards

No. 17,839

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed April 26, 1968)

Before: WEICK, Chief Judge, and EDWARDS and PECK, Circuit Judges.

In reliance on the opinion of this Court in *Knox* v. *UAW*, 351 F.2d 72 (1965) the District Court held that it was without jurisdiction to determine damages for breach of a labor union's duty of fair representation of its members. Fourteen days after the District Judge filed his opinion the Supreme Court in *Vaca* v. *Sipes* (386 U.S. 171 (1967)) ruled that the jurisdiction of the National Labor Relations Board over such claims is not exclusive but is shared with the courts, federal and state. Having made his determination on the jurisdictional issue, the District Judge did not pass upon other issues presented by the record, and

IT IS ORDERED that the judgment of the District Court be and it is vacated and it is further ordered that the

case be and it is hereby remanded to the District Court for consideration in the light of *Vaca* v. *Sipes, supra.*

ENTERED BY ORDER OF THE COURT

/s/ Carl W. Reuss
Clerk

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

(Filed September 25, 1969)

Upon consideration of defendants' motion for summary judgment heretofore filed herein, and

After oral argument in open court by counsel for the respective parties, consideration of the briefs submitted by counsel and review of the remand order of the Court of Appeals, and

It appearing to the Court that said motion should not be granted,

IT IS HEREBY ORDERED that said motion be and the same is hereby denied.

Thomas P. Thornton
United States District Judge

MEMORANDUM RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed October 4, 1972)

The Amended Complaint herein consists of three counts. Counts I and III complain of the action of Hawthorne Metal Products Company, a named defendant

at the time of filing the said amended Complaint. Since that time Hawthorne made a settlement with plaintiff so that presently plaintiff's cause of action is against Local 417 and is set forth in Count II.

The factual background of this controversy has its beginning in the discharge of plaintiff by Hawthorne July 10, 1962. Arbitration of plaintiff's grievance was had and the arbitrator's award provided for plaintiff's reinstatement "but without back pay." Plaintiff claims that there was a refusal to reinstate him according to the award and that "defendant Union has failed, refused and neglected to insist it do so, although the collective bargaining agreement provides that: 'The decision of the umpire shall be final and binding on both parties.'" In Count II, paragraphs 3 through 5 plaintiff says as follows:

> 3. As the statutory collective bargaining agent, defendant Union owed to plaintiff the duty to enforce his rights under the collective bargaining agreement, fully and completely.
>
> 4. Notwithstanding said duty in the premises, defendant Union wholly failed, refused and neglected to do so and, on the contrary, confederated and cooperated with defendant Company to prevent plaintiff from receiving the fruits of the award in his favor by agreeing to require of plaintiff that he submit to and pass a physical examination as a condition of reinstatement, contrary to the terms of the award and engaged in a course of dilatory action calculated to delay the return of plaintiff to his employment.
>
> 5. As a result of defendant Union's breach of duty as aforesaid, plaintiff has suffered, and will continue to suffer, great loss of wages and other increments accruing to him under the collective bargaining agreement

> and, in addition thereto, has been worried over his future and that of his family because of their lower income and standard of living and has suffered humiliation and embarrassment by being out of employment for long periods of time since 1962; to his damage in the sum of $25,000.00.

It seems clear that plaintiff's action against the Union is one for breach of duty of fair representation. The bases of defendant's motion for summary judgment are set forth in its brief submitted September 2, 1970. They are as follows:

> (1) Plaintiff did not exhaust his intra-union remedies; (2) Plaintiff does not claim or believe that defendant Unions, in handling his problem, were motivated by fraud, discrimination, or any other kind of bad faith; and (3) Plaintiff has already received $15,000 in settlement from defendant Company.

Each side to this controversy arrives at a different result in reliance on the same line of cases concerning the necessity for exhausting of intra-union remedies.* There appears to be no question about the fact that plaintiff did not only fail to exhaust his intra-union remedies but did not even appeal from the Local 417 executive board's decision. Under these circumstances this Court must follow the law of the Sixth Circuit as laid down in *Bshara* v. *Eltra Corp.*, 394 F.2d 503 (CA6 1968), which appears to us to require more pursuit by plaintiff of intra-union remedies

---

*On defendant's motion for summary judgment previously heard this Court held that it was without jurisdiction in reliance on *Knox* v. *UAW*, 351 F.2d 1972 (CA6 1965). Subsequently the Supreme Court handed down its decision in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), and the Court of Appeals for the Sixth Circuit remanded the instant matter "for consideration in the light of Vaca v. Sipes." We therefore consider defendant's motion without resort to the NLRB jurisdiction re damages for breach of a labor union's duty of fair representation of its members.

within the framework of the union constitution and by-laws. Plaintiff cites the 1969 opinion of the United States Supreme Court in *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324. There was present there an element of futility (as to exhaustion of intra-union remedies) to such a degree as to provide an exception to the exhaustion rule. The Court said that "[t]he allegations are that the bargaining representatives of the car employees have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race." The very fact of a suit for breach of duty of fair representation evidences some form of dispute between an employee and the union. If this is a basis for sustaining a claim of futility then the exhaustion requirement could never be enforceable. Such is not the law.

Plaintiff's motion for summary judgment should be granted and an order may be presented accordingly.

Thomas P. Thornton
United States District Judge

SECOND MEMORANDUM RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed December 11, 1972)

This Court has ruled that defendant's motion for summary judgment should be granted. The Court hereby incorporates by reference its October 4, 1972 MEMORANDUM RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT. Plaintiff seeks reconsideration of defendant's said motion contending that the Court failed to obey the mandate of the Court of Appeals in this matter and that the issue re exhaustion of "all intra-union remedies

in this situation is one of law and fact and as such not subject to summary judgment."

The mandate of the Court of Appeals hereinabove referred to reads as follows:

> Before: WEICK, Chief Judge, and EDWARDS and PECK, Circuit Judges.
>
> In reliance on the opinion of this Court in *Knox* v. *UAW* 351 F.2d 72 (1965), the District Court held that it was without jurisdiction to determine damages for breach of a labor union's duty of fair representation of its members. Fourteen days after the District Judge filed his opinion the Supreme Court in *Vaca* v. *Sipes* (386 U.S. 171 (1967)) ruled that the jurisdiction of the National Labor Relations Board over such claims is not exclusive but is shared with the courts, federal and state. Having made his determination on the jurisdictional issue, the District Judge did not pass upon other issues presented by the record, and IT IS ORDERED that the judgment of the District Court be and it is vacated and it is further ordered that the case be and it is hereby remanded to the District Court for consideration in the light of *Vaca* v. *Sipes*, supra.
>
> ENTERED BY ORDER OF THE COURT
>
> /s/ Carl W. Reuss
> Clerk

It seems clear to this Court that the Court of Appeals made one determination and only one determination, namely, that in light of *Vaca* v. *Sipes* the National Labor Relations Board does not have exclusive jurisdiction over this type of claim and that, therefore, this United States District Court is not without jurisdiction. The Court of Appeals specifically noted that "the District Court did not pass

upon other issues presented by the record." In its memorandum of October 4, 1972 the Court *did* pass upon the other issues presented by the record and in so doing determined that defendant's motion for summary judgment should be granted. The Court is not persuaded that there should be any change in said memorandum and hereby reiterates, for the reasons stated therein, that defendant's motion for summary judgment should be granted. An order may be presented accordingly.

Thomas P. Thornton
United States District Judge

ORDER GRANTING DEFENDANT UNION'S MOTION FOR SUMMARY JUDGMENT

(Filed December 19, 1972)

The Court has considered Defendant Union's Motion for Summary Judgment, and the briefs and oral arguments presented by both sides and, in a Memorandum dated October 4, 1972, and a Second Memorandum dated December 11, 1972, has decided that Defendant Union's Motion should be granted.

For the reasons stated in the aforementioned memoranda, the Court hereby orders that Defendant Union's Motion for Summary Judgment be granted and that this complaint and action be dismissed.

Thomas P. Thornton
United States District Judge

ORDER OF SIXTH CIRCUIT COURT OF APPEALS (SECOND APPEAL)

(Filed June 13, 1973)

Before WEICK, EDWARDS and PECK, Circuit Judges.

Upon consideration of the record, briefs and arguments of counsel, we are of the opinion that plaintiff has not exhausted his intra-union remedies, which he was required to do before maintaining this action. *Bsharah* v. *UAW*, 394 F.2d 502 (6th Cir. 1968).

Furthermore, the record does not reveal any issue of fact to be tried concerning any claim of fraud, deceitful action, dishonesty, arbitrary or discriminatory conduct or bad faith on the part of the union. *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

Appellant settled his claim against his employer for $15,000. Even if the union was liable to plaintiff, he could recover only to the extent that the union's conduct, rather than the conduct of the company, caused actual damage to him. *St. Clair* v. *Teamsters Local 515*, 422 F.2d 128, 132 (6th Cir. 1969).

The judgment of the District Court is AFFIRMED.

ENTERED BY ORDER OF THE COURT.

/s/ James A. Higgins
Clerk

INDEX

	Page
Questions Presented	1
Statement of the Case	2
The Facts	2
The District Court's Decision	7
The Court of Appeals' Decision	8
Argument	9
I. The Decision In This Case Does Not Conflict With Any Decisions Of This Court	9
II. The Decision In This Case Does Not Conflict With Decisions Of Other Courts of Appeals	13
Conclusion	15

CITATIONS

CASES:

Brady v. *Trans World Airlines, Inc.*, 401 F. 2d 87 (3rd Cir. 1968), *cert. denied* 393 U.S. 1043 13

Czosek, et al. v. *O'Mara, et al.*, 397 U.S. 25, 25 L.Ed. 2d 21, 90 S. Ct. 770 (1970) 9, 11

Fredrickson v. *System Fed. No. 114 of Ry. Emp. Dept.*, 436 F. 2d 764 (9th Cir. 1970) 14

Glover v. *St. Louis-San Francisco Railway Co.*, 393 U.S 324, 21 L.Ed. 2d 519, 89 S. Ct. 548 (1969) 8, 9, 10, 11

Imel v. *Zohn Mfg. Co.*, — F. 2d —, 71 CCH Lab Cases Para. 13.773 (10th Cir. 1973) 13

Neal v. *System Board of Adjustment*, 348 F. 2d 722 (8th Cir. 1965) 13

Page

O'Mara v. *Erie Lackawanna Railroad Company, et al.*, 407 F. 2d 674, 678 (2nd Cir. 1969) 11

Orphan v. *Furnco Construction Corp.*, 466 F. 2d 795 (7th Cir. 1972) 14

Retana v. *Apartment, Motel, Hotel & El. Op. U., Loc. No. 14*, 453 F. 2d 1018 (9th Cir. 1972) 14

Steelworkers v. *American Manufacturing Company*, 363 U.S. 564, 4 L.Ed. 2d 1403, 80 S. Ct. 1343 (1960) 12

Steelworkers v. *Enterprise Wheel and Car Corporation*, 363 U.S. 593, 4 L.Ed. 2d 1424, 80 S. Ct. 1358 (1960) 12

Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L.Ed. 2d 1409, 80 S. Ct. 1347 (1960) ... 12

Syres v. *Oil Workers International Union, Local No. 23 and Gulf Oil Corporation*, 350 U.S. 892, 76 S. Ct. 152 (1955), *rehearing denied* 350 U.S. 943, 76 S. Ct. 299 (1965) 9, 11

Vaca v. *Sipes*, 386 U.S. 171, 17 L.Ed. 2d 842, 87 S. Ct. 903 (1967) 7

STATUTE:

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4) ... 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-455

WOODROW SEE, *Petitioner,*

v.

LOCAL UNION 417, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW), *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

I. Did the court of appeals err in affirming the district court's summary judgment of dismissal on the ground that plaintiff did not exhaust his intra-union remedies?

II. Did the court of appeals err in affirming the district court's summary judgment of dismissal on the additional ground that the undisputed facts in the record showed no violation by the Union of its duty of fair representation?

STATEMENT OF THE CASE

The Facts

There is no dispute between petitioner and respondents as to the basic, material facts of this case, which are as follows:

Petitioner Woodrow See was employed by the Hawthorne Metal Products Company in 1958; on July 10, 1962, See was discharged for refusing to follow a supervisor's instructions. Shortly thereafter, respondent Union filed a grievance protesting See's discharge, claiming that it violated the terms of the collective bargaining agreement between the company and the Union. The grievance was processed through the first four steps of the grievance procedure. Unable to secure See's reinstatement at these levels, the Union demanded that the grievance be submitted to arbitration. An arbitration hearing was held and on September 12, 1962, the arbitrator issued a decision and award. (1b-7b)[1]

The arbitrator found that See had wrongfully disobeyed his supervisor's instructions, but ordered him reinstated without back pay, thus reducing the discharge to a disciplinary suspension. (7b)

---

[1] Record references are to the appendices submitted in the Court of Appeals and to the appendix included at the end of the Petition; i.e., "—a" and "—b" refer respectively to petitioner and respondents' appendices in the Court of Appeals. "A—" refers to the appendix in the Petition.

Immediately after the award was rendered, the company called See back to work. The dispute giving rise to this case begins here. When he appeared at the plant, the company informed him that it would be necessary for him to have a physical examination by the company's doctor in accordance with the company policy of requiring anyone absent from the plant for more than 30 days to have an examination. (41b) See had been absent from the plant since his discharge on July 10, 1962, a period more than double the 30-day limit in the company's physical examination policy. See had the examination and the company's doctor reported that he had a bad back and should not be returned to work. (8b) Based on this report, the company notified the Union that See could not be reinstated. The Union immediately protested the company's action, and in a meeting on September 28, 1962, at which See was present, obtained an agreement that See would be examined by a doctor designated by the union and if the results of that examination conflicted with the report of the company's doctor, a third doctor would be selected whose report would be determinative. (8b-9b)

Pursuant to the September 28th agreement, See was examined, at the Union's expense, by another doctor. (10b) At the conclusion of this examination, the doctor informed See that the results were inconclusive and that before a final opinion on See's back condition could be made, spinal x-rays should be made and reviewed by an orthopedic consultant.

See refused to have the spinal x-rays, and on October 31, 1962, filed a grievance claiming that the company should reinstate him without further physical

examinations. It was at this point the Union decided that the question of additional physical examinations should be put to one of the attorneys in the Legal Department of the International Union. (21a) The question was discussed with an assistant general counsel at a meeting at which See was present. (21a) The attorney advised that See should have the spinal x-rays and orthopedic examination and that his October 31st grievance should be held pending the results of this examination. After the meeting, the president of Local 417 drove See to Beaumont Hospital. Although the president had arranged for Local 417 to pay for the orthopedic specialist's examination, See never had the x-rays or the examination. (20a-21a)

At a union membership meeting on December 2, 1962, the chairman of the shop committee reported that he was referring See's case to the local president and to an international representative. (22a) See protested this action, and his case was presented to the local's executive board on December 4, 1962. The executive board initially passed a resolution calling for the appointment of a three-member committee to meet with the company and negotiate See's reinstatement as soon as possible. (22a) At the next executive board meeting on December 17, 1962, however, the board rescinded its earlier resolution and passed a new one which provided that See should follow the advice of the UAW's Legal Department and have the x-rays and orthopedic examination. (22a-23a)

At this point See asked Dean Spooner, a fellow employee who had represented and assisted See at the executive board meetings and who six months later was elected president of the local, to represent him in

an internal union appeal to the International Executive Board of the UAW. (23a) Spooner declined, indictating that he felt he lacked experience, and suggested that See retain a lawyer to represent him on an internal appeal since the UAW's Constitution allowed for representation by counsel. (23a) Instead, See filed an unfair labor practice charge against the local with the National Labor Relations Board. See never did take an internal union appeal.

In his charge, filed April 3, 1963, See alleged that the Union had, in violation of its duty of fair representation, refused to process his October 31, 1962 grievance. (23b) After investigation, the Regional Director for Region Seven, on May 22, 1963, notified See that his charge was dismissed. (24b-25b) In the dismissal letter, the Regional Director summarized the events that had taken place and noted that See had never had the spinal x-rays and orthopedic examination. The Regional Director concluded that "there is no evidence which would show that the Union failed to process the grievance filed by [See] on or about October 31 for considerations which would be unfair, unreasonable or arbitrary . . . ." (25b) See appealed to the General Counsel of the National Labor Relations Board, and on July 31, 1963, the General Counsel affirmed the dismissal of the charge, "substantially for the reasons stated in the Regional Director's latter of May 22, 1963". (26b)

Thereafter, See again contacted Dean Spooner, who by this time was the president of the local, and, for the first time, brought to Spooner's attention the fact that See had been examined by his own doctor and had received a report, dated November 12, 1962,

stating he was physically able to return to work. (24a) Spooner took this report to the company and requested that it be regarded as the report of the union designated doctor, and, since it conflicted with the company doctor's report, that a third doctor be appointed whose decision, according to the terms of the September 28, 1962 agreement, would be determinative. (24a-25a)

The company initially agreed to the Union's request and submitted the names of two doctors, one of whom would act as the third doctor. (27b-28b). Neither was acceptable to the Union, and in a letter dated September 24, 1963, Spooner proposed that the third examination be done at either Henry Ford, Harper, Metropolitan or the University Hospital at Ann Arbor. (25a) A day later, the company rejected the Union's proposal and took the position the See case was closed. (25a; 30b) On that same day, Spooner notified the company that the Union did not consider the case closed (31b), and on October 10, 1963, Spooner had the chairman of the shop committee file a grievance protesting the company's refusal to meet with the Union to discuss the case and its refusal to agree to an impartial medical facility for the third examination. (32b)

The company twice refused to discuss the grievance, taking the position the case was closed. In the meantime, however, See was examined at Henry Ford Hospital and received a report that he was able to work. (25a) This report was submitted to the company in a meeting on December 13, 1963. When the company refused to accept it, the Union proposed that if See was reinstated the demand for back pay for the

period subsequent to the company's refusing to allow him to work because of the company doctor's report would be dropped. The company indicated that it would consider the proposal. (25a)

On December 30, 1963, the Union signed a memorandum agreement which provided that See would be reinstated with full seniority rights but without back pay. (36b) That same day See reported to work, but when requested to sign the memorandum agreement, refused to do so. (26a) In January 1964, the instant action was commenced against the company and the Union. At no time has See made an attempt to exhaust any of the internal union remedies provided in the Constitution of the International Union, UAW. On April 9, 1964, an order of discontinuance was entered in the district court as to the company; this was the result of a $15,000.00 settlement between See and the company.

The Decision of the District Court

On the basis of the affidavits, exhibits and depositions in the record, the district court entered a memorandum opinion granting the Union's motion for summary judgment. (A7-A10)[2] The district court held there was "no question about the fact that plaintiff

[2] This was the second time the complaint had been dismissed and summary judgment granted the Union. On February 10, 1967, the district court had dismissed the complaint, finding the action one within the exclusive primary jurisdiction of the National Labor Relations Board. (A3-A5) Fourteen days later and while this dismissal was on appeal to the Court of Appeals for the Sixth Circuit, this court decided *Vaca* v. *Sipes*, 386 U.S. 171, 17 L.Ed. 2d 842, 87 S. Ct. 903 (1967). On the basis of that decision, the court of appeals vacated the district court's judgment and remanded the case for consideration in the light of *Vaca*. (A6-A7)

did not only fail to exhaust his intra-union remedies but did not even appeal from the Local 417 executive board's decision." (A9) In response to plaintiff's reliance on this court's opinion in *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 21 L.Ed. 2d 519, 89 S. Ct. 894 (1969), the district court noted that in *Glover* "[t]here was present * * * an element of futility (as to exhaustion of intra-union remedies) to such a degree as to provide an exception to the exhaustion rule". (A10) The district court found no such elements present in the instant case, noting that if the mere existence of a dispute between a member and his union was "a basis for sustaining a claim of futility [,] then the exhaustion requirement could never be enforceable". (A10)

The Court of Appeals' Decision

On June 13, 1973, the Court of Appeals for the Sixth Circuit entered an order affirming the district court's judgment granting summary judgment for the Union. (A13) The court of appeals affirmed the district court on two grounds.

First, the court found that the undisputed record established that See had not exhausted his intra-union remedies which, absent an element of futility, "he was required to do before maintaining this action." (A13)

Second, the court of appeals held that the undisputed record did "not reveal any issue of fact to be tried concerning any claim of fraud, deceitful action, dishonesty, arbitrary or discriminatory conduct or bad faith on the part of the union," and thus summary judgment was properly granted for the Union. (A13) The court of appeals also noted, without making it a

ground for decision, that in an action for breach of the duty of fair representation, a plaintiff can recover from the union "only to the extent that the union's conduct, rather than the conduct of the company, caused actual damage to him." (A13)

ARGUMENT

As reasons for granting the writ petitioner asserts that the decision below is in conflict with decisions of this Court and other courts of appeals and violated his right to a jury trial on the issue of damages.

I. The Decision in This Case Does Not Conflict with Any Decision of This Court.

Petitioner asserts that the decision in this case conflicts with this Court's decisions on (1) exhaustion of intra-union remedies in duty of fair representation suits, and (2) arbitration of labor-management disputes.

1

Petitioner claims the decision here conflicts with what this Court has ruled and said on exhaustion of intra-union remedies in three cases: *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 21 L.Ed. 2d 519, 89 S. Ct. 548 (1969), *Czosek, et al.* v. *O'Mara, et al.*, 397 U.S. 25, 25 L.Ed.2d 21, 90 S. Ct. 770 (1970), and *Syres* v. *Oil Workers International Union, Local No. 23 and Gulf Oil Corporation,* 350 U.S. 892, 76 S. Ct. 152, *rehearing denied* 350 U.S. 943, 76 S. Ct. 299 (1955). In two of them — *Czosek* and *Syres* — the exhaustion of intra-union remedies was not even discussed, and the third, *Glover,* the rule applied by this Court was the one applied in this case,

the difference in result reflecting only the differences in facts.

In *Glover,* thirteen employees, most of whom were Black, filed a suit against the railroad and the union alleging they were denied promotions to higher job classifications because of racial discrimination. To the claim that it had violated its duty of fair representation, the union defended on the ground that the employees had not exhausted their intra-union remedies. The Court acknowledged the requirement[3], noting that it has exceptions, one of which applied — the futility exception. In concluding that it would have been futile for the employees to exhaust their intra-union remedies, the Court had recourse to the following facts: the employees were told they "could never get white men's job", they "were treated with condescension by both [the union and the company], sometimes laughed at and sometimes 'cussed' ", "the white plaintiffs were referred to as 'nigger lovers' " and told "that they were just inviting trouble", and both the railroad and union "attempted to intimidate [them]". 394 U.S. at 326-327.

The district court, in the instant case, recognized the futility exception, saying: "[T]here was present [in Glover] an element of futility (as to the exhaustion of intra-union remedies) to such a degree as to provide

---

[3] Congressional approval of the exhaustion requirement was given in Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4), which protects a union member's right to sue his union, subject to the proviso that "such member may be required to exhaust reasonable hearing procedures (but not to exceed a four months lapse of time) within such [labor] organization, before instituting legal or administrative proceedings against such organization or any officer thereof".

an exception to the exhaustion rule." (A10) On the undisputed facts in *this* case, however, the court found no futility. The court of appeals agreed. Plainly, there is no conflict between this case and *Glover*. In *Glover* this Court applied the exhaustion requirement but found futility. In this case the courts below applied the exhaustion requirement and, on the totally different facts involved here, found no futility.

Petitioner's reliance on *Czosek, supra,* and *Syres, supra,* is even more misplaced since neither case involved a question of exhaustion of intra-union remedies. *Czosek* involved exhaustion of *administrative* remedies under the Railway Labor Act, not intra-union remedies under a union constitution, as petitioner virtually admits and as the court of appeals' decision in *Czosek* makes clear. *O'Mara* v. *Erie Lackawanna Railroad Company, et al.,* 407 F. 2d 674, 678 (2nd Cir. 1969).

In *Syres, supra,* the district court dismissed a Black local union's action against a white local and the employer for racial discrimination on the ground that it lacked jurisdiction, and the court of appeals affirmed. 223 F.2d 739, 744 (5th Cir. 1955). In its memorandum decision of reversal, this Court simply cited three of its duty of fair representation cases involving racial discrimination, indicating that the duty of fair representation supplied a jurisdictional basis for the action. The exhaustion of intra-union remedies requirement — raised not by the union, but by the employer — was nowhere discussed.

2

Petitioner also asserts that the decision below conflicts with a line of this Court's decisions "which

enunciates the strong public interest in maintaining the integrity of the grievance and arbitration processes".[4]

But this case has nothing whatsoever to do with the integrity of the grievance and arbitration processes. This is not a case in which one of the parties refused to arbitrate a grievance, or balked at an arbitration award. See *was* called back to work, as the arbitrator had ordered. What happend thereafter (the company's requiring him to take the physical; his failing it; and the company's refusal to return him to work) was not a failure of compliance with the arbitration award, but a new problem, which the Union came to grips with, and ultimately solved, with its usual tool — collective bargaining. It bargained the company into agreeing to further physicals, and ultimately bargained it into agreeing to See's reinstatement despite his having failed the original physical. This is not a story of the arbitration process betrayed, but of its being honored — and followed by practical collective bargaining on a new problem which arose in the wake of the original discharge.[5]

Thus there is no conflict between the decision in this case and any of this Court's decisions.

---

[4] E.g., *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960); *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960); *Steelworkers* v. *American Manufacturing Company*, 363 U.S. 564, 4 L.Ed. 2d 1403, 80 S.Ct. 1343 (1960).

[5] Moreover, even if we assume, *arguendo*, that the matter of the physical examination was not a new problem, but one as to the implementation of the award, for the parties to resolve it by good faith collective bargaining—rather than by going back to the arbitrator, or to court in cross-suits on the award—supports the arbitration process, rather than undermines it.

II. The Decision in This Case Does Not Conflict with Decisions of Other Courts of Appeals.

Petitioner asserts that the decision here is in conflict with four decisions by other courts of appeals. There is, however, no conflict whatsoever. In all four cases the other courts of appeals applied the same basic rule applied here, *i.e.*, a member cannot recover against his union on a duty of fair representation claim without exhausting his intra-union remedies, unless it would be futile for him to pursue them.[6] The only differences between the four decisions and the one here are in result — all of which are due to factual or procedural differences.

In *Brady v. Trans World Airlines, Inc.*, 401 F. 2d 87, 104 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1043, the court ruled that the exhaustion of internal union remedies requirement applies to all claims *for breach of the duty of fair representation*, saying:

> It has been the general rule, and the rule of this circuit, that before a suit against a union *for breach of its duty of fair representation* may be brought in the courts, the member must first exhaust the available internal union remedies, or show an adequate reason for failing to do so. (Emphasis added.)

The one claim to which the court refused to apply the exhaustion requirement was *not* for breach of the duty of fair representation, but for violation of Section 2 (Fourth) (Eleventh) of the Railway Labor Act, dealing with union security. *Id.* at 102.

---

[6] Other courts of appeals have also applied this rule. See, e.g., *Imel* v. *Zohn Mfg. Co.*, — F.2d —, 71 CCH Lab Cases Para. 13.773 (10th Cir. 1973), and *Neal* v. *System Board of Adjustment*, 348 F.2d 722 (6th Cir. 1965), decision by then judge, now Justice Blackmun.

In both *Retana* v. *Apartment, Motel, Hotel & El. Op. U., Local No. 14,* 453 F. 2d 1016 (9th Cir. 1972), and *Orphan* v. *Furnco Construction Corp.,* 486 F. 2d 795 (7th Cir. 1972), the members' actions were dismissed not on motions for summary judgment, but on motions to dismiss, and on the ground that the complaints failed to allege exhaustion of intra-union remedies. And in each, the court of appeals reversed because other facts alleged in the complaint, if proved, might constitute futility. 453 F. 2d at 1027-28, 466 F. 2d at 801-02.

In *Fredrickson* v. *System Fed. No. 114 of Ry. Emp. Dept.,* 436 F. 2d 764 (9th Cir. 1970), the district court ruled against the members on the ground of failure to exhaust intra-union remedies. The court of appeals reversed on the ground that there was absolutely no evidence in the record of a union remedy. *Id.* at 768. In the instant case the district court's dismissal on the exhaustion ground was based on an undisputed record which included evidence of the internal-union remedies available to petitioner. (23a; Articles 31 and 32, UAW Constitution, attached to motion to dismiss filed February 25, 1963)

Petitioner's claim of conflict with other circuits is utterly unsupported.[7]

---

[7] Petitioner also claims the court of appeals violated his right to a jury trial on damages. After setting forth its two grounds for affirmance, the court of appeals noted, by way of *dictum,* that even if the Union were liable, petitioner could recover only to the extent that he might have been damaged by the Union's conduct, as distinguished from the company's. The most obvious error in petitioner's claim that this paragraph deprived him of his right to a jury trial is that, as noted, the paragraph is not a ground for decision but is plainly *dictum.*

CONCLUSION

For the foregoing reasons respondents submit that a writ of certiorari should not issue.

Respectfully submitted,

JOHN A. FILLION
General Counsel

JORDAN ROSSEN
Assistant General Counsel

CHARLES LOOMAN
Assistant General Counsel

8000 East Jefferson Avenue
Detroit, Michigan 48214
Tel: (313) 926-5216

Attorneys for Respondents

By: JOHN A. FILLION

Of Counsel:

EDWIN G. FABRÉ
LEONARD PAGE
M. JAY WHITMAN
Assistant General Counsel

8000 East Jefferson Avenue
Detroit, Michigan 48214
Tel: (313) 926-5216

October 10, 1973